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State of California

Memorandum

455 Golden Gate Avenue, Suite 1193
San Francisco, CA 94102

Date: July 14, 1993

To: STAFF

From: Gail W. Jesswein, Chief
Division of Apprenticeship Standards
Department of Industrial Relations

Subject: ENFORCEMENT POLICY

This finalizes, with certain modifications, the draft policy circulated in March, 1993. It reflects CAC activity through April 30, 1993, to accommodate statutes and regulations under its interpretive authority to the federal law requirements announced in the So. Cal. ABC Supreme Court decision.

1. DAS PROGRAM APPROVALS

A. Adverse Impact/Consultation

The portion of 8 C.C.R. § 212.2(a) regarding consultation with existing programs and notification of approvals by the Chief will be followed. However, the issues on which comments will be received are restricted to state standards or requirements for approval that carry out an explicit federal requirement.[1] The existing programs making comments should indicate not only the state law supporting their objections, but the counterpart federal requirement that would save the state law from preemption. The CAC will consider only the Appeals of the Chief's program approval which assert state law bases that are saved from preemption.

Adverse impact may no longer be taken into account for program approvals. Although the schedule of wages and benefits costs must still be submitted as part of the required Standards, and available

[1] The Division has considered the Supreme Court's footnote which mentions the possibility that there might be peculiarly local adaptations of general federal requirements, whose preemption would present a more difficult question. Thus far, no such conditions unique to California have been brought to the Division's attention.

EXHIBIT H-1

EXHIBIT

to interested parties, these may not, indirectly or directly, be made the bases for challenges as to "adverse impact" on existing programs.

B. Need

The "need" requirement under Labor Code section 3075 is a basis for challenging program approvals, but subject to a special consideration process, pursuant to a directive of the CAC. A program that meets all other statutory and regulatory requirements for approval will be put into operation pending resolution of whether "need" is preempted, by either the State Supreme Court or the federal Ninth Court of Appeals on "ERISA" grounds. If a final holding is that "need" in Labor Code section 3075 is preempted, then the interim approval(s) will become final. If not, approval(s) shall be subject to further review by an appeals panel of the California Apprenticeship Council as to the "need" for such program.

C. Joint v. Unilateral

Programs have, in the past, been approved as "joint" although the employee representatives serving on committees were not agents of a bona fide collective bargaining representative. This divergence between the requirements of Labor Code section 3075 and the definitions in 29 C.F.R. § 29.2(i) will be resolved by approving such programs with employee representatives who are not agents of a union only as "unilateral," and reserving the appellation "joint" to those where there is union representation on the JATC. Existing programs previously approved should be invited to amend their Standards to correct this misnomer.

A sponsor of a "unilateral" program who nonetheless wishes to involve employees in an advisory capacity on a committee who are not agents of a collective bargaining representative may do so, but should be counseled to consider the possible consequences under the National Labor Relations Act.

D. Wages

Although adverse impact is no longer a criteria, wages are a separate matter, albeit sometimes they have been commingled for analytical purposes by the CAC. The requirement for a progressively increasing schedule of wages in the federal standards, 29 C.F.R. § 29.5(b)(5), will be the subject of review for all entry wages set under 8 C.C.R. §§ 208(1) and (2) and 212(c)(7)(A) and (B) as follows to conform to current BAT practice under the Code of Federal Regulations:

For On-The-Job-Training (OJT) Employment On Private Work
--Joint Programs--

The entry level wage under the regulation shall be 50% of the average current journey-level wage. That wage is measured among the sponsoring contractor(s)' journeymen with whom the apprentice will be employed. 16 Ops.Cal.Atty.Gen. 170 (1950) (Interpreting both § 3078 and § 1777.5; collecting prior opinions to 1939). In "Joint" programs the wage will ordinarily be the CBA rate. A lower percentage may be set by a collective bargaining agreement, provided that the resulting wage is not less than the current state or federal minimum wage

For OJT Employment On Private Work
--Unilateral Programs--

Where there is a Joint Apprenticeship Training Committee in the same trade in the same area (i.e., one in which the apprentices are represented by a union), and that program has exercised its option to set the percentage below 50%, then the unilateral program can use the same percentage against the average wage among its own journeypersons. However, the resulting entry level must be above the current state or federal minimum wage.

Otherwise, the general rule is that the entry level wage is 50% of the journey-level wage, measured against the average current journey-level wage of contractors participating in the program.

For OJT Employment On Public Works
--All Programs--

Both Joint and Unilateral programs follow the identical rule--the progressively increasing percentage rate in the Standards is used,[2] however, the journey-level rate against which the percentage is calculated is

[2] Because the percentages in the Standards are applied against the journeyperson scale on public works, it is theoretically possible that a program (most likely Unilateral, but also Joint) from an area where all programs start at 50% could leave its contractors at a disadvantage in bidding on out-of-area work (See E., below) where that area's Joint programs had entry level percentages below 50%. This becomes a practical problem only where extensive out-of-area bidding occurs, and the apprentices to be used are so junior that they are at the entry level, at the different hourly cost points. Rather than revise all Standards to take such contingencies into account for the occasional out-of-area public works bid, the CAC has proposed uniform percentages for Standards, in a regulation sent to rulemaking this April 30 If the rulemaking does not progress and the problem appears significant, this issue will require re-visiting.

instead the journey-level rate, for that craft, which applies to that particular public work which has been determined to be prevailing.

Both the entry level and progressive wage percentages in the Standards are applied against the published prevailing rate of per diem wages applicable to public works. That prevailing rate is that required for the journey-level by the state prevailing wage law on state funded jobs, Labor Code § 1771 (in the determinations published by the Department's DLSR), or the Davis-Bacon wages on federally funded jobs (published by the Department of Labor) for the craft or classification in the area of the site of the public work. For jobs which are funded both by state and federal monies, the higher of the two journey-level wages should be used.[3]

E. Geographic Area

The statement of the geographic area within which the Standards apply, 8 C.C.R. § 212(b)(2), is not a limitation as to the area within which an apprentice may be employed. It is required for programs to be approved in order to monitor two federally required criteria--recruitment and related and supplemental instruction. Thus, the statement of the program's geographic area in its Standards does not limit the area in which recognized apprentices can work.

The first reason geographic area need be specified in the Standards is that both state and federal regulations require verification that the apprentice will receive organized, related, and supplemental instruction (RS&I), 29 C.F.R. § 29.5(b)(4) and 8 C.C.R. § 212(a)(3). When an apprentice's On-The-Job (OJT) training employment location is remote from the RS&I classroom location, special arrangements, subject to DAS approval, must be made to ensure continuity of the related and supplemental instruction.

A second reason is that a statement of geographic area is required to specify the area of recruitment, against which the mandatory affirmative action requirements are measured. 29 C.F.R. §§ 30.1, et seq., requires local outreach and recruitment, as well as goals and timetables, keyed to the sponsor's labor market area. 29 C.F.R. § 30.4(c)(1), (e), (g); 8 C.C.R. Appendix to § 215. "Geographic area" means that area of applicant recruitment and selection.

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[3] The CAC formal rulemaking addresses a different system to set apprentice wages. How that new system conforms to So. Cal ABC. and current legal requirements will be reviewed in the rulemaking process. If a replacement for the above is enacted, or the foregoing is disapproved in proceedings before the CAC, that change will be the subject of later notification.

Therefore, in existing Standards, a statement of geographic area for recruitment, and within which RS&I classroom training occurs, should be updated when the area of those activities expands. It is optional to change the Standards to specify the out-of-area range within which apprentices may be offered a dispatch to OJT work, as contractors secure jobs.

F. Ratios

Numerical ratios of apprentices to journeypersons will continue to be set, according to the particular trade's requirements for proper supervision, training safety, and continuity of employment, 8 C.C.R. § 212(b)(6), 29 C.F.R. § 29.5(b)(7), and the impact of the ratio on continuity of employment will continue to be a factor, § 212(b)(7) and § 29.5(b)(7). A ratio in the Standards, whether manditory or voluntary, applies equally to public and private work when apprentices are used on the job, even if their use is not statutorially or contractually compelled.

2. DAS PUBLIC WORKS ENFORCEMENT

A. Ratio/Mandatory Hiring

The CAC has directed that contractor debarments for willful violation of the requirements of Labor Code section 1777.5 as to failure to observe the mandatory minimum ratio of apprentices to journeypersons be processed in light of an intervening Supreme Court case on the issue of preemption generally, Building and Construction Trades Council and Mass. Water Resources Auth. v. ABC of Mass., ___ U.S. ___, 113 S.Ct. 1190 (1993). The DAS will investigate allegations of violations of sections of the Labor Code concerned with employment of apprentices on the public works--the requirement that contractors request apprentices on work which required the minimum 20% of hours in section 1777.5; the requirement to notify local committees of contract awards; and complaints against programs for refusals to provide apprentices to contractors, 8 C.C.R. §§ 230, 230.1.

The requirement of section 1777.5 that contractors agree to abide by the Standards of the local program from which they secure apprentices remains modified by the Council's regulation, 8 C.C.R. § 230.1(a), in light of the express holding of Hydrostorage. That interpretation of section 1777.5 was not affected by CAC's action and is governed by CAC's current regulations. Therefore, no violations alleging failure to sign on to the existing program's Standards should be pursued.

B. Fringe Benefits/ERISA Trust Funds

Similarly, based on the Hydrostorage decision and the CAC's regulation in response to that decision, the requirement of 8 C.C.R. § 230.2 and Labor Code section 1777.5 that contractors contribute apprenticeship training funds to the CAC, with an option to take credit for contributions to an approved apprenticeship committee in which the contractor participates, remains in effect. The DLSE Enforcement Policy of this same date addresses, separate from the contribution required by 8 C.C.R. § 230.2, issues of amount and conditions for other training contributions to be credited in partial satisfaction of the general prevailing rate of per diem wage obligation.

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